No. 91-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES DEPARTMENT OF THE TREASURY AND MITCHELL A. LEVINE, ASSISTANT COMMISSIONER,

Petitioners,

—v.—

GEORGE FABE, SUPERINTENDENT OF INSURANCE, STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF SALVATORE R. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR, IN SUPPORT OF RESPONDENT

William F. Jerome
State of New York
Insurance Department
Liquidation Bureau
123 William Street
New York, New York 10038

Mathias E. Mone
Counsel of Record
Adam Liptak
James R. Oswald
CAHILL GORDON & REINDEL
(a partnership including a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

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This brief *amicus curiae* is respectfully submitted on behalf of Salvatore R. Curiale, Superintendent of Insurance of the State of New York, in his capacity as Liquidator, Rehabilitator, Ancillary Receiver and Conservator of a number of insurance companies placed under his supervision pursuant to Article 74 of the New York Insurance Law. Pursuant to Rule 37 of the Rules of this Court, *amicus* has obtained and files herewith the written consent of each of the parties to the filing of this brief. *Amicus* supports Respondent George Fabe, Superintendent of Insurance of the State of Ohio.

INTEREST OF THE AMICUS CURIAE

Amicus is the Superintendent of Insurance of the State of New York and appears here in several capacities, including as liquidator of insolvent insurance companies chartered by or having their United States domicile in the State of New York.[1] These insurance companies are being liquidated in the courts of the State of New York under the provisions of the New York statute governing the rehabilitation and liquidation of insolvent insurance companies, Article 74 of the New York Insurance

1 *Amicus* is liquidator of 44 insolvent insurance companies domiciled in the State of New York: American Consumer Insurance Company, American Enterprise Insurance Company, American Fidelity Fire Insurance Company, Bakers Mutual Insurance Company of New York, Carriers Casualty Company, Citizens Casualty Company of New York, Consolidated Mutual Insurance Company, Constellation Reinsurance Company, Cosmopolitan Mutual Insurance Company, Dominion Insurance Company of America, Executive Life Insurance Company of New York, First Amvestors Life Insurance Company, First Northern Title Insurance Company, Fulton Reinsurance Company, Health and Welfare Association, Inc., Heartland Group Inc., Horizon Insurance Company, Ideal Mutual Insurance Company, Knickerbocker Insurance Company, Lincoln Central Life Insurance Company of America, Long Island Insurance Company, Manhattan Casualty Company, Massachusetts Life Insurance Company of New York, Midland Insurance Company, Midland Property and Casualty Insurance Company, Nassau Insurance Company, New Re Insurance Corporation, New England Life Insurance Company of New York, New York National Insurance Company, New York State Trial Lawyers Insurance Company, Northeastern Life Insurance Company of New York, Northumberland General Insurance Company (United States Branch), Northumberland General Insurance Company-41 Trust, Pine Top Syndicate, Professional Insurance Company of New York, Resources Insurance Company, River Plate Reinsurance Company Limited, Shamrock Casualty Company, Southeastern Casualty and Indemnity Insurance Company, Summit Insurance Company of New York, The Realex Group N.V., U.S. Risk Inc., Union Indemnity Insurance Company of New York and Whiting National Insurance Company. In his capacity as Liquidator of the Union Indemnity Insurance Company of New York, *amicus* filed a petition for certiorari in *Curiale* v. *United States*, 60 U.S.L.W. 3617 (U.S. Feb. 24, 1992) (No. 91-1347) presenting a question similar but not identical to that presented here. (Both the nature of the federal government's claims and of the state insurance statute at issue in *Curiale* are different from those at issue here.) The petition is pending.

Law, N.Y. Insurance Law § 7401, *et seq.* (McKinney 1985 and Supp. 1992). Like the Ohio insolvency statute at issue in the present case, New York's insurance insolvency law, which embodies the Uniform Insurers Liquidation Act (1939), 13 U.L.A. 328 (1986), determines among other things the priority of claims against the estate of insolvent insurance companies.

In addition to his duties as liquidator, the Superintendent of Insurance acts as rehabilitator of New York-domiciled insurance companies whose financial condition is impaired, and as ancillary receiver or conservator of insurance companies that are domiciled in other jurisdictions and are undergoing insolvency or delinquency proceedings in those jurisdictions. Altogether, as of the most recent period for which statistics are available, *amicus* as liquidator, rehabilitator, or receiver was responsible for the administration of proceedings in the New York courts involving 72 insurance companies with total reported assets of over $4.1 billion.

In all of these capacities, *amicus*' central mandate is the protection of the interests of the affected policyholders. The result sought by petitioners would dramatically reduce the funds available to pay policyholder claims.[2] A decision in petitioners' favor may also have wide-ranging implications for New York's comprehensive regulation of the business of insurance, including its complex regulatory and judicial system govern-

2 In some cases, guaranty funds established under state law may also play a role in paying the claims of policyholders of insolvent insurers. Such funds, on paying out such claims, file proofs of claim against the estates of the insolvent insurers. Because these guaranty funds are funded through assessment of solvent insurers, a decision in petitioners' favor may in some cases have an extremely broad impact, including, in the final analysis, on scarce state tax revenues, since the solvent insurer may offset such guaranty fund assessments as a credit against state taxes. *See generally Corcoran* v. *Ardra Insurance Co.*, 657 F. Supp. 1223, 1232 (S.D.N.Y. 1987) ("the [New York Property/Casualty Security] Fund, like many others, is not self-sustaining; it is crucial, therefore, to creditors of the insolvent insurer, as well as to policyholders, stockholders, and creditors of presently solvent insurers—forced to contribute to the fund—that the deficit of the insolvent insurer be reduced as much as possible"), *appeal dismissed and mandamus denied*, 842 F.2d 31 (2d Cir. 1988).

But it is well to keep in mind that life and health insurance companies write any number of insurance products the contractual obligations of which (i) exceed guaranty association limits of protection or (ii) are not accorded any protection whatsoever. The estate of the failed insurer is the only refuge for persons with claims that exceed or are not covered by guaranty association protections.

The state insurance guaranty associations represented by NCIGF and NOLHGA are part of the comprehensive system enacted by the states to handle insurance company insolvencies. All guaranty associations work closely with state officials, typically the insurance commissioner, legally responsible for the rehabilitation, conservation or liquidation of a financially impaired or insolvent insurance company. The creation of guaranty associations by the states is but one example of how insurance company insolvencies have been handled under the aegis of state law, rather than federal law. The guaranty associations act as a limited safety net in covering certain obligations of insolvent insurers to their insureds and third-party claimants. Claims not covered by a guaranty association are generally submitted directly to the insurance company in liquidation to be handled by the liquidator. In those cases where claims are paid by a guaranty association, under state insurance insolvency laws the subrogation claims of guaranty associations have the same priority as claims of insureds.[4]

As a result of the above-described state based system of resolving insurance insolvencies, the insurance company liquidator and the appropriate insurance guaranty associations are the two primary sources of protection of insureds of insolvent insurance companies. Accordingly, the various state guaranty associations have a strong involvement and interest in the present system whereby the states determine the priority of claims

[4] See, e.g., Ohio Rev. Code Ann. § 3903.42(C) (Anderson 1989).

against insolvent insurance companies as part of the general, comprehensive state-based system of regulating the business of insurance.[5]

SUMMARY OF ARGUMENT

The United States Department of the Treasury (the "Treasury Department") has filed claims of approximately $10.7 million on various bonds issued by the now insolvent American Druggists Insurance Company ("ADIC"). The Treasury Department has asserted that its claims are entitled to first priority under 31 U.S.C. 3713(a)(1)(A)[6]. The Liquidator of ADIC, George Fabe, the Superintendent of Insurance of the State of Ohio, has maintained that the federal claims are entitled to fifth priority under the Ohio Insurers Supervision, Rehabilitation, and Liquidation Act, Ohio Rev. Code Ann. § 3903.01 *et seq.* (Anderson 1989 & Supp. 1991) ("Insurers Liquidation Act"). Under the Ohio statute, claims are paid in the following order: (1) administrative expenses, (2) wage and benefit claims, (3) policyholder claims, (4) claims of general creditors, and (5) claims of federal, state and local governments. Additionally, there are three lower classes of claims. Ohio Rev. Code Ann. § 3903.42 (Anderson 1989).

Given this conflict between the federal and state laws, the Treasury Department has argued that the Ohio law is preempted by 31 U.S.C. 3713(a)(1)(A). The Liqui-

[5] Pursuant to Sup. Ct. R. 37.3, the parties' written consents to the filing of this amici curiae brief have been filed with the Clerk.

[6] 31 U.S.C. 3713(a)(1)(A) provides that:

> A claim of the United States Government shall be paid first when—
>
> (A) a person indebted to the Government is insolvent and—
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed. . . .

dator has countered that preemption of the Ohio law is barred by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* That Act provides, inter alia, that "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b).

Clearly, the federal general priority statute, 31 U.S.C. 3713, is not an Act that "specifically relates to the business of insurance." Hence the core issue in this appeal is whether the Ohio law regulating insurance company insolvencies, and, specifically, prioritizing claims against insolvent insurance companies, regulates "the business of insurance." Based on both the plain meaning of the statute and this Court's prior analysis of the scope of McCarran-Ferguson, NCIGF and NOLHGA believe the Ohio insurance insolvency statute clearly regulates the business of insurance.

1. The starting point in any issue of statutory construction is the plain language of the statute itself. If the meaning of the statute is clear on its face, there is no need to proceed any further. In the present case, the issue is whether the Ohio insurance code provision establishing the relative priorities of claims against insolvent insurance companies regulates "the business of insurance." The very essence of the business of insurance is the payment of insureds when potential risks become actual claims. Since the Ohio insurance insolvency statute determines, as a practical matter, if and how much an insured (or claimant) will get paid, the Ohio law clearly regulates the business of insurance.

2. If the Court moves beyond the plain language of the statute to cases interpreting it, it will not find any of its own decisions directly on point. However, this Court has recently decided three cases interpreting the phrase "the business of insurance" which support the

conclusion that the Ohio statute is the type of regulation covered by McCarran-Ferguson. *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). The first of those cases held that the McCarran-Ferguson Act was concerned with matters such as the "relationship between insurer and insured," the "reliability" and "enforcement" of insurance policies, and the companies' "status as reliable insurers." 393 U.S. at 460. The Ohio priority statute gives a high priority to the claims of insureds against an insolvent insurance company. This increases the reliability of their policies and their ability to enforce them. This in turn enhances the relationship between the insurer and insured as set forth by *National Securities* so as to bring the Ohio priority statute under the protection of McCarran-Ferguson.

Royal Drug and *Pireno* analyzed three factors to determine if a practice by a state regulates the business of insurance:

a) "whether the practice has the effect of transferring or spreading a policyholder's risk"

b) "whether the practice is an integral part of the policy relationship between the insurer and the insured"

c) "whether the practice is limited to entities within the insurance industry"

458 U.S. at 129. The Ohio statute, which gives a high priority to insureds' claims, meets each of these three criteria. First, the priority assigned to a policyholder's claim will have a direct bearing and a major impact on whether the policyholder has in fact transferred the risk in the event his or her insurance company goes insolvent. Second, the most integral part of the policy relationship—from the point of view of the insured—is whether the insurer pays the claims it admittedly owes. The Ohio

priority scheme, which maximizes the likelihood of such payment in the event of insolvency, thus deals with a fundamental part of the relationship between the insurer and insured. Third, the Ohio Insurers Liquidation Act deals solely with the priority of claims against insurance companies. It does not attempt to regulate claims against any entities outside the insurance industry.

In sum, the Ohio Act comes within the clear meaning of the McCarran-Ferguson Act and within the meaning as analyzed by the prior decisions of this Court.

ARGUMENT

I. A STATE STATUTE WHICH PRIORITIZES CLAIMS AGAINST INSOLVENT INSURANCE COMPANIES REGULATES "THE BUSINESS OF INSURANCE" UNDER THE PLAIN MEANING OF THAT PHRASE AS USED IN THE McCARRAN-FERGUSON ACT.

The field of insurance has long been an area of dominant state concern. This Court held early on that "[i]ssuing a policy of insurance is not a transaction of commerce" *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 183 (1868). It was therefore widely believed and held that insurance was not subject to federal regulation under the Commerce Clause. Thus, the Court surprised and raised great concerns within the insurance industry and the state and federal governments when it ruled in *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944), that insurance transactions are subject to federal regulation under the Commerce Clause in general, and the antitrust provisions of the Sherman Act in particular.

Congress reacted quickly to *South-Eastern Underwriters* by passing the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* That Act reflects the long-established national policy that insurance be regulated at the state level:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. 1011. That general statement of policy was codified by the Congress in a specific provision which protects against preemption of state laws in this field by the federal government:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.[7]

15 U.S.C. 1012(b).

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[7] It is noteworthy that unlike the Sherman Act, the Clayton Act and the Federal Trade Commission Act, the federal priority law, 31 U.S.C. 3713(a)(1)(A) was not deemed by McCarran-Ferguson to be applicable to the business of insurance, even though the federal priority statute had been enacted long before McCarran-Ferguson. Furthermore, while Congress has subsequently declared other federal laws to be applicable to the insurance industry notwithstanding McCarran-Ferguson, it has never made such a declaration about 31 U.S.C. 3713(a)(1)(A). "[T]he Sixth Circuit has established that '[v]arious statutes enacted by Congress . . . have been amended to establish federal dominance in certain areas pursuant to the McCarran-Ferguson Act. Nevertheless, 31 U.S.C. § 3173, the federal superpriority statute has not been amended to that effect.'" *Garcia v. Island Program Designer, Inc.*, No. 91-1679, 1992 WL 106774 (D. Puerto Rico, April 21, 1992) (copy included in the Appendix at 15a) (quoting the Sixth Circuit decision in the present case).

This case presents a clear conflict between state and federal law. On the one hand, Ohio and all the other states have enacted a comprehensive statutory scheme regulating insurance companies from the cradle to the grave. A significant section of that code deals with insolvent insurance companies in general and claims against them in particular. The Ohio statute prioritizes claims against these companies as follows:

(1) Administrative Expenses,

(2) Wage and Benefit Claims,

(3) Policyholder Claims,

(4) Claims of General Creditors,

(5) Claims of Federal, State and Local Governments,

(6) Late Filed Claims or Miscellaneous Claims,

(7) Surplus or Contribution Notes, and

(8) Claims of Shareholders or Other Owners.

Ohio Rev. Code Ann. § 3903.42 (Anderson 1989). Insurance codes in other states set similar priorities for claims. Federal law, by contrast, contains a general provision which grants the federal government a first priority for its claims against a debtor who has become insolvent. 31 U.S.C. 3713. This statute does not relate to insurance companies in particular.

Normally in a situation such as this, the Commerce and Supremacy Clauses of the U.S. Constitution would require that the state law be preempted by the federal law. However, as noted earlier, Congress has expressly barred the doctrine of preemption from applying to state laws regulating the business of insurance unless the federal law at issue "specifically relates to the business of insurance." In the present case, there is no question that 31 U.S.C. 3713 does not relate specifically to the business of insurance. Its terms speak generally to cases where someone indebted to the United States has become

insolvent; the federal law does not mention or refer to insurance companies in any way. Thus, the present dispute turns on the question of whether the Ohio statute prioritizing claims against insolvent insurance companies regulates the business of insurance.

In deciding whether the Ohio law regulates the business of insurance, the threshold consideration is the language of the McCarran-Ferguson Act itself. *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 557-558 (1990) ("Our construction . . . is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself."); *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language."); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). If the meaning of that language is clear and plainly applies to the Ohio law, then there is no need for any additional analysis. *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2636 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances."); *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). In this case, the Ohio provision at issue falls within the clear and plain meaning of the phrase "the business of insurance."

Ohio Rev. Code Ann. § 3903.42 is part of a comprehensive state statute regulating all aspects of the business of insurance. See Ohio Rev. Code Ann. Title 39 (Anderson 1989 & Supp. 1991). This comprehensive regulation of the insurance industry by the State of Ohio is typical of what is found in the other states as well. The regulation of insurance company insolvencies (Ohio Rev. Code Ann. Chapter 3903) is simply one part of this overall statutory scheme. It involves, *inter alia*, the appointment of a liquidator to marshall all the assets of the insurance company and the adjustment and payment of

claims against the insurance company. The insurance company is operated by the liquidator in most respects as an ongoing company, the primary exception being that it no longer takes on any new business during the liquidation proceedings. In other words, while the insolvency proceedings are pending, the insurance company continues to conduct most aspects of the business of insurance other than the solicitation of new customers and the issuance of new policies. For example, the liquidator may, and does, employ employees and agents;[8] conduct "the business . . . of the insurer;"[9] continue to prosecute and to commence in the name of the insurer any and all suits or legal proceedings;[10] enforce reinsurance contracts;[11] and collect unpaid earned premiums from any person.[12] The statutory scheme regulating insolvent insurance companies in Ohio is typical of the framework set up in the other states under the NAIC's Insurers Rehabilitation and Liquidation Model Act (1991).[13]

All of the regulations established by the Ohio statute, including the priority scheme, are designed to see that the *raison d'etre* of insurance—the payment of insureds' claims—in fact occurs:

> Up until the time there is a claim and a payment is made, the only tangible evidence of insurance is a piece of paper. In other words, the real product of insurance is the claims proceeds. Selection of the prospect, qualifying him for coverage that suits his

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[8] Ohio Rev. Code Ann. § 3903.21(A)(2) and (3) (Anderson 1989).

[9] Ohio Rev. Code Ann. § 3903.21(A)(4) (Anderson 1989).

[10] Ohio Rev. Code Ann. § 3903.21(A)(12) (Anderson 1989).

[11] Ohio Rev. Code Ann. § 3903.32 (Anderson 1989).

[12] Ohio Rev. Code Ann. § 3903.33 (Anderson 1989).

[13] Section 42 of the Model Act deals with the priority of claims against insolvent insurance companies. See also Uniform Insurers Liquidation Act §§ 6-8, 13 U.L.A. 321-353 (1986).

> needs, delivery of a policy, collecting premiums for perhaps years, making changes in coverage to meet changing situations, all of these are but preambles to the one purpose for which the insurance was secured, namely to collect dollars if and when an unforeseen event takes place.

J. Wickman, *Evaluating the Health Insurance Risks*, 57 (1965). Thus, the state priority scheme falls within the plain and commonly understood meaning of the phrase "the business of insurance." It is the business of insurance to pay claims when a possible risk has blossomed into an actual claim. That act, more than any other act in the field of insurance, is what is commonly understood to be the business of insurance. Ohio Rev. Code Ann. § 3903.42 insures that the commonly understood meaning of the most basic business of insurance is a reality, even in those instances when an insurance company has become insolvent. As such, it is well within the meaning of the phrase "the business of insurance," if in fact not at the very core of that phrase. Accordingly, the McCarran-Ferguson Act dictates that the Ohio statute is not preempted and that Ohio law controls the disposition of all claims against American Druggist Insurance Company.

II. A STATE STATUTE WHICH PRIORITIZES CLAIMS AGAINST INSOLVENT INSURANCE COMPANIES REGULATES "THE BUSINESS OF INSURANCE" AS THAT PHRASE HAS BEEN INTERPRETED IN PRIOR SUPREME COURT CASES INVOLVING THE McCARRAN-FERGUSON ACT.

While this case presents an issue of first impression for this Court,[14] the Court has previously analyzed the

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[14] Five federal court cases have addressed the specific issue now before the Court. The first two cases to decide this issue ruled that prioritizing claims against an insolvent insurance company did not constitute the business of insurance. *Gordon v. United States Dep't. of the Treasury*, 846 F.2d 272 (4th Cir.), *cert. denied*, 488 U.S. 954 (1988); *Idaho ex rel. Soward v. United States*, 858 F.2d 445 (9th

meaning of "the business of insurance" in other contexts. Although none of those cases were analogous to the present appeal, the general language and analysis contained in three such cases supports respondent's position that McCarran-Ferguson includes within its scope the type of state statute at issue here.

In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the SEC attempted to enjoin violations of Section 10(b) of the Securities Exchange Act and Rule 10(b)-5 in connection with misrepresentations and omissions in communications by National Securities to shareholders of Producers Life Insurance Co. National Securities was proposing to merge Producers with an insurance company controlled by National Securities. After the SEC was denied temporary injunctive relief, the shareholders of Producers approved the merger. Pursuant to state law, the Arizona Director of Insurance found that the merger was not inequitable to Producer's shareholders and not otherwise contrary to law, and the merger was consummated. 393 U.S. at 457. The SEC thereafter amended its complaint seeking to unwind the merger. National Securities argued that since the merger had been approved by the State Director of Insurance pursuant to state law, McCarran-Ferguson barred the SEC's attempt to use the Securities Exchange Act to unwind the merger. The issue thus presented to the Court was whether the

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Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989). Subsequent to those two decisions, the Sixth Circuit created a conflict among the circuits by its decision in the present case. Since the Sixth Circuit decision herein, two United States District Courts have relied upon that decision in holding that the state/commonwealth priority statutes for insolvent insurance companies regulated the business of insurance and therefore came within the protection of McCarran-Ferguson. *Garcia v. Island Program Designer, Inc.* No. 91-1679, 1992 WL 106774 (D. Puerto Rico, April 21, 1992) (hereinafter "*Garcia*"); *Lyons v. United States*, No. 4-91-10209 (S.D. Iowa, July 2, 1992) (hereinafter "*Lyons*") (copy included in the Appendix at 8a).

Arizona statute was a "law enacted . . . for the purpose of regulating the business of insurance." 393 U.S. at 457. This Court held that "[w]e do not believe that a state statute aimed at protecting the interests of those who own stock in insurance companies comes within the sweep of the McCarran-Ferguson Act." 393 U.S. at 457. The Court found that McCarran-Ferguson addressed concerns such as the "relationship between insurer and insured," the "reliability" and "enforcement" of insurance policies, and the companies' "status as reliable insurers." 393 U.S. at 460. By contrast:

> [A]rizona is concerning itself with a markedly different set of problems. It is attempting to regulate not the "insurance" relationship, but the relationship between a stockholder and the company in which he owns stock. This is not insurance regulation, but securities regulation. . . . The crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies. Such regulation is not within the scope of the McCarran-Ferguson Act.

393 U.S. at 460.

Unlike the Arizona statute, Ohio Rev. Code Ann. § 3903.42 protects the insureds of insolvent insurance companies—not their shareholders. Insureds' claims are given a high priority—above those of general creditors, federal, state and local governments, late claims, miscellaneous claims, surplus or contribution notes and "claims of shareholders or other owners." Ohio Rev. Code Ann. § 3903.42 (Anderson 1989). As *Lyons* said of the comparable Iowa statute:

> The focus of the McCarran-Ferguson Act is on protecting policyholders. . . . [citing *National Securities*] The Sixth Circuit in *Fabe*, observed that "it is clear from the language and operation of [Ohio's Insolvent Insurer's statute] that its focus is the protection of

> insureds by diverting the scarce resources of the liquidated entity away from any non-insured creditors, toward policyholders." Iowa's insolvent insurer's statute is similarly focused.

Lyons at p. 13a. Thus, in protecting the policyholders of insolvent insurance companies, the Ohio statute has precisely the intent required by *National Securities.*

Additionally, unlike *National Securities*, the present case does not involve a party trying to invoke McCarran-Ferguson to evade liability for violations of federal law. The present suit is brought by the Liquidator of ADIC to maximize the assets available to insureds in the face of attempts by the federal government to jump ahead in line and thereby jeopardize whether the insureds will collect from their insurance company. If the Court accepts the position of the United States, the insureds will ultimately recover less than if the position of the Liquidator is upheld. Thus, consistent with the directive of *National Securities*, and unlike the state statute in that case, the Ohio law is designed to protect the interests of insureds.

The Court next visited the issue of the scope of "the business of insurance" in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). That case involved a Sherman Act claim against a Blue Shield insurance company in Texas. The suit claimed that contractual agreements Blue Shield had with pharmacies throughout the state of Texas violated § 1 of the Sherman Act by fixing the retail prices of drugs and causing some of Blue Shield's policyholders to boycott certain pharmacies that did not participate in the Blue Cross Pharmacy Agreements. 440 U.S. at 207. The issue before the Court was "[w]hether the Court of Appeals was correct in concluding that these Pharmacy Agreements are not the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act." 440 U.S. at 210. The Court reasoned that the Pharmacy Agreements had nothing to do with the spreading of a policyholder's risk,

but were merely contractual arrangements to help minimize the cost of meeting its promises to its policyholders. As the Court noted, "so long as that promise is kept, policyholders are basically unconcerned with arrangements made with Blue Shield and participating pharmacies." 440 U.S. at 214. The Court also noted that the Pharmacy Agreements were not between the insurer and the insured, but were, instead, "separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance." 440 U.S. at 216. Finally, the Court thought it was significant that the Pharmacy Agreements involved parties "wholly outside the insurance industry." 440 U.S. at 231.

In contrast to *Royal Drug*, the present case impacts directly on whether the ADIC insureds successfully transferred their risks to an insurer as they intended when they entered into their insurance contract, or whether the full brunt of that risk is going to land on their shoulders due to the insolvency of ADIC. Unlike *Royal Drug*, this is clearly not a case where the "policyholders are basically unconcerned" with the operation of the Ohio insurance insolvency statute. Policyholders are vitally concerned with whether the Ohio statute operates as written to maximize the chance their claims will be paid. Second, the Ohio statute focuses directly on the enforcement of the insurance contract between insurer and insured, rather than an organized series of contracts with third party pharmacies. Third, the State Insurance Insolvency Statute prioritizes claims only against insurance companies, not against parties "wholly outside the insurance industry." 440 U.S. at 231.

Finally, unlike *Royal Drug*, the present case does not involve an attempt to use McCarran-Ferguson to circumvent the requirements of the Sherman Act. This was precisely the point upon which the Court in *Garcia* distinguished *National Securities*, *Royal Drug* and *Pireno*:

alleged anti-competitive practices affected insurance costs and therefore "the risk that the insurer would be unable to pay claims" (presumably, by forcing the insurer out of business). Pet. Br. at 20. In addition to being far-fetched, petitioners' argument misses the point. The activities in *Royal Drug* and *Pireno* were not an integral part of the insurer-insured relationship because they were designed only to strengthen the insurers' market share at the expense of competitors, a purpose completely independent of the policyholders' interests. The Ohio statute, to the contrary, goes to the heart of the insurance relationship by helping ensure that the policyholder will get what he or she contracted for: reimbursement of insurance claims.

Petitioners also argue that the statute is not an integral part of the insurance relationship because during liquidation "there is no longer a relationship between the policyholder [*sic*]." Pet. Br. at 20. Again, the flaw in this argument is that the insurance company does not disappear upon entry of an order of liquidation. Although an order of liquidation may signal the impending demise of the insurer, the insurer-insured relationship continues during liquidation: insureds continue to make claims against the insurer; the liquidator, on behalf of the insurer, continues to adjust those claims; and the insurance company through the liquidator continues to pay legitimate claims to the extent there are funds available. Payment of claims by the insurer " 'brings the insurance contract "to life" in a fashion far more vivid than does any other single act in connection with the purchase, issuance, and maintenance of the contract.' " *Pireno*, 458 U.S. at 137 n.2 (Rehnquist, J., dissenting) (quoting Butler, "Loss Adjustment in Fire Insurance," in *Property and Liability Insurance Handbook* 219 (J. Long & D. Gregg eds. (1965)). Thus, contrary to petitioners' assertions, the Ohio statute's priority scheme is indeed an integral part of the insurer-insured relationship.

c. The Act's priority scheme focuses primarily on the insurer and the insured

This Court has made clear that, to satisfy this third criterion, an insurance activity need not be limited exclusively to entities within the insurance industry. "[T]he challenged [ ] practices need not be denied the [McCarran-Ferguson] exemption *solely* because they involve parties outside the insurance industry." *Pireno*, 458 U.S. at 133 (emphasis in original). Rather, in *Royal Drug* and *Pireno*, the Court focused on the importance and degree of participation of outside entities in the challenged insurance practice.

The alleged price-fixing measures in *Royal Drug* and the peer review process in *Pireno* both involved intentional arrangements by insurers for affirmative participation by third parties, who were essential to achieving the insurers' goals of strengthening their market position. Unlike these practices, the Ohio Insurers Supervision Act does not require, and does not seek, any sort of active participation by entities outside the insurance industry. Indeed, outside parties are "involved" in the Ohio statute only by negative implication: prioritizing necessarily means placing one class of claims before another.

The Ohio statute satisfies the third *Pireno* criterion because it is directed first and foremost to the two entities that form the cornerstone of the insurance industry: the insurer and the insured. Incidental implication of third parties is not sufficient to take the Ohio statute outside the definition of "regulation of the business of insurance."

That a state insurance liquidation statute may rank certain classes of claims ahead of policyholders' claims does not alter this conclusion. As the court below found, the "focus is the protection of insureds by diverting the scarce resources of the liquidated entity away from any non-insured creditors, toward policyholders." *Fabe*, 939 F.2d at 352. The goal remains protection of the policyholders. Due to the insolvent insurer's limited funds, allowing the government to leapfrog ahead would often result in the policyholders receiving nothing, thus frustrating the goal of insurance liquidation statutes.

In sum, the court below correctly held that the Ohio statute satisfies all three of the *Royal Drug/Pireno* requirements for determining whether the statute "regulates the business of insurance." Therefore, pursuant to McCarran-Ferguson, state law governs here so that policyholders—the class that state insurance liquidation statutes were enacted to protect—will have priority when claiming against insolvent insurers.[14]

B. The Legislative History Of McCarran-Ferguson, If Relevant At All, Supports The Conclusion That State Insurance Statutes And Not The Federal Priority Statute Must Determine The Priority Of The Distribution Of Assets Of Insolvent Insurers

Petitioners also argue that this Court should look to what they refer to as the "enactment history" of McCarran-Ferguson to determine the scope of the term the "business of insurance." Pet. Br. at 22. They suggest that examination of such history supports the notion that McCarran-Ferguson merely served to restore the *status quo* that existed prior to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the decision of this Court that prompted enactment of McCarran-Ferguson. Pet. Br. at 23. Under this *status quo*, they argue, the question presented here had already been decided in favor of the Federal Priority Statute in cases like *United States* v. *Knott*, 298 U.S. 544 (1936), and thus McCarran-Ferguson is, notwith-

14 A contrary determination would not only harm policyholders, but would also disrupt other aspects of state regulation of insolvent insurers. The federal and state courts of New York have made it clear, for instance, that under McCarran-Ferguson, New York insurance insolvency law, *see Knickerbocker Agency, Inc.* v. *Holz*, 4 N.Y.2d 245, 149 N.E.2d 885, 173 N.Y.S.2d 602 (1958), and not the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (1988 & Supp. II 1990), governs the arbitrability of claims involving insolvent New York insurers. *See Washburn* v. *Corcoran*, *supra*, 643 F. Supp. at 556; *Corcoran* v. *Ardra Insurance Co.*, 156 A.D.2d 70, 553 N.Y.S.2d 695 (1st Dep't), *aff'd*, 77 N.Y.2d 225, 567 N.E.2d 969, 566 N.Y.S.2d 575 (1990), *cert. denied*, 111 S. Ct. 2260 (1991). A determination by this Court that one aspect of a state insurance liquidation system is not regulation of the "business of insurance" may cast doubt on this and other long-standing state policies.

standing its plain terms, of no effect in this case (and, by implication, in any other case where a conflict between a federal statute of general application and a state insurance statute had been decided prior to McCarran-Ferguson's enactment).

There are three flaws in this argument. First, the actual text of McCarran-Ferguson says nothing about a return to the pre-*South-Eastern Underwriters status quo*. Instead, it states quite unambiguously that "*No* Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . ." 15 U.S.C. § 1012(b) (emphasis added). Congress made no exception for federal statutes enacted "in the earliest days of the Republic," Pet. Br. at 6; neither did it except statutes that, prior to enactment of McCarran-Ferguson, had been ruled to govern notwithstanding contrary state law under familiar principles of federal constitutional supremacy.

Second, McCarran-Ferguson's legislative history indicates that Congress intended to do far more than simply "overrule" *South-Eastern Underwriters*. Indeed, as Justice Powell recognized in his partial concurrence in *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1099-1100 n.5 (1983), Congress rejected a version of McCarran-Ferguson which would have merely overturned the holding of *South-Eastern Underwriters* and opted instead for the current, broader law. The legislative history provides extensive support for this unstrained reading of the statute. *See, e.g.*, 91 Cong. Rec. 483 (1945) (Remarks of Sen. Radcliffe) ("It is unnecessary and unwise to create any doubt as to the right of the States to go ahead and function freely in the handling of insurance."); 91 Cong. Rec. 487 (1945) (Remarks of Sen. Wherry) ("[McCarran-Ferguson] would put the regulation of the insurance business in the hands of the States. That is the important thing in this bill."). *See also Prudential Insurance Co.* v. *Benjamin*, *supra*, 328 U.S. at 429 (McCarran-Ferguson drafted "broadly to give support to the existing *and future* state systems for regulating and taxing the business of insurance" (emphasis added)).

Third, even if *Knott* and similar cases were relevant here, they did not squarely rule on a conflict between statutes such as those presently at issue. In *Knott*, for instance, this Court considered a state statute that "contained only generalized provisions protecting domestic creditors in Florida insurance companies over foreign creditors." *Fabe*, 939 F.2d at 348. As the court below correctly held, such a statute "in no way regulated the 'business of insurance' for the protection of the insured." *Id.* The holding in *Knott*, then, even if it could be said to have survived the enactment of McCarran-Ferguson, is of no effect here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

William F. Jerome
State of New York
Insurance Department
Liquidation Bureau
123 William Street
New York, New York 10038

Mathias E. Mone
Counsel of Record
Adam Liptak
James R. Oswald
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

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